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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

HARTLEY PEN COMPANY,

Petitioner,

vs.

FORMULABS, INC., and E. I. DU PONT DE NEMOURS & COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Formulabs, Inc., respondent, respectfully opposes the granting of the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed by Hartley Pen Company.

Opinions Below.

The opinion of the Court of Appeals is set forth in the petition (Pet. App. A, pp. 1-9) and is reported at 275 F. 2d 52, 124 U. S. P. Q. 398.

The District Court wrote no opinion, its order denying the petition for intervention being found at [R. 236].

The Question Presented.

Petitioner confuses the matter when it says:

> "The questions presented cannot be adequately epitomized because of the multiple phases thereof, the many proceedings and voluminous record involved and the unprecedented manner in which intervention was obtained in this case." (Pet. p. 2).

There can be no doubt but that petitioner conceives this to be the case, however, for its "Index" (Pet. pp. 2, 3, 4 and 5) sets forth seven (7) questions, eighteen (18) additional questions being set forth in the petition at pages 6, 34, 35, 36, 37 and 39.

It is the position of the respondent that there is but a single question involved which may be simply stated as follows:

> Does F. R. C. P. 24 (a)(3) give to one not a party to an action pending in a United States District Court the right to intervene for the purpose of asserting an admitted proprietary right to prevent the destruction of its property under the order of the Court?

The Court of Appeals accurately assessed the matter and said:

> "The sole issue on this appeal is whether the district court erred in denying Formulabs' motion to intervene. The resolution of that issue in turn depends upon the construction to be given to the provisions of the pertinent provisions of Rule 24, Federal Rules of Civil Procedure." (Pet. App. A, pp. 4, 5).

Petitioner has at times agreed and said:

"The sole issue on the appeal was whether Formulabs had established the right to intervene, as a matter of right, under Rule 24(a)(3), F. R. C. P." (Pet. p. 6).

Statement of the Case.

Respondent accepts the statement of the facts as set forth by the Court of Appeals (Pet. App. A, pp. 1-6).

It should be added, however, that in the District Court there was no trial, no findings of fact, no conclusions of law, and no ruling except as set forth in the Order Denying Petition for Intervention [R. 236]. The attention of the District Court focused upon the existence or non-existence of a right as determined by the meaning of F. R. C. P. 24(a)(3). The decision of the Court of Appeals was similarly directed to that issue.

Respondent's Position.

It is the position of the respondent that:

1. F. R. C. P. 24(a)(3), as amended effective March 19, 1948, clearly permits intervention by an applicant so situated as to be adversely affected by the disposition of property subject to the control of the court;
2. The decision of the Court of Appeals for the Ninth Circuit
   (a) is not in conflict with the decision of another Court of Appeals on the same matter;
   (b) is not in conflict with applicable state or territorial law;
   (c) is not in conflict with applicable decisions of this court; and

(d) has not departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervision.

3. The decision of the Court of Appeals for the Ninth Circuit has decided an important question of federal law but its decision clearly correctly interprets the plain language of F. R. C. P. 24(a)(3).

4. To deny the right to intervene to protect one's property from destruction under the processes of the Court is to deny due process of law.

5. The petition fails to present any special or important reasons justifying the consideration of this Court.

ARGUMENT.

Point 1.

Federal Rules of Civil Procedure, Section 24(a)(3) as Amended, Effective March 19, 1948, Clearly Permits Intervention by an Applicant so Situated as to Be Adversely Affected by the Disposition of Property Subject to the Control of the Court.

By amendment effective March 19, 1948, F. R. C. P. 24(a)(3) was altered by the inclusion of the words appearing in italics in the following quotation of the rule:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other dis-

position of property *which is* in the custody *or subject to the control or disposition* of the court or an officer thereof."

Moore's Federal Practice, Vol. 4, p. 58, says:

"The 1946 amendment to Rule 24(a)(3) clarified the question of court control. Under the amendment, property need not be actually in the custody of the court or an officer thereof if it is 'subject to the control or disposition' of the court."

The petitioner (See Pet. p. 2), the Court of Appeals (See Pet. App. A, p. 6), and this respondent are all in agreement that there appears to be no controlling decision which has interpreted or construed the amended subsection F. R. C. P. 24(a)(3).

The property to be protected in this case comprises a trade secret and no contention has been made that such a secret is not as entitled to the protection of the law as other property.

Judge Taft, later Chief Justice of this Court, in *Cincinnati Bell Foundry Co. v. Dodds* (1887), 19 Weekly Law Bulletin, 10 Ohio Dec. Reprint 154, stated with clarity the concept of property in a trade secret in the following words:

"The property in a trade secret is the power to make use of it to the exclusion of the world. If the world knows the process then the property disappears. There can be no property in a process, and no right of protection if knowledge of it is common to the world."

Respondent Formulabs holds a proprietary interest in the trade secret in question which had been disclosed in confidence to the petitioner Hartley. The District Court

by its order to Hartley to disclose this trade secret to du Pont, a third person, was exercising a control and authority over that property in violation of Formulabs' right to have the secret remain inviolate. The District Court recognized that the formula was in its control and stated:

> "The Court: You (Hartley) are in this court with that formula." (Parenthetical matter added) [R. 273].

Disclosure by the order of the District Court would have been to du Pont, to its agents, to its experts, to the jury, to all present in the court room at the trial, to the record, to the public in general. There were no protective restrictions and it is difficult to see how satisfactory protection could have been provided in a jury trial involving experts. Compliance with the court order would have effected the loss of the secrecy of the Formulabs' trade secret. This was recognized by the District Court judge who said:

> "The Court: Well, I think the few cases I have read indicate the only way to keep anything is to keep it to yourself and if you tell it to a second person that information travels very fast." [R. 369].

Petitioner Formulabs bases its right to intervene upon the express provisions of part (3) of Rule 24(a), for it is so situated that it will be "adversely affected by a distribution or other disposition of property which is . . . subject to the control or disposition of the court." It was contended below that intervention was not available, for petitioner's property would not be disposed of by the *judgment* of the court but instead by interlocutory order.

In Rule 24 part (2) it is expressly provided that the applicant is entitled to intervene when he is inadequately

represented and "may be bound by a judgment." In part (3), however, no mention is made of a "judgment." Had it been intended that the property to be protected must be disposed of by a judgment, rather than by an interlocutory order, why was no reference made to a judgment in part (3)? It is clear that disclosure and publication of a trade secret under an interlocutory order can destroy the secrecy fully as effectively as publication under a judgment.

The reference to "judgment" in part (2) and the omission of any reference to "judgment" in adjacent part (3), leads to the conclusion that part (3) is in no way dependent upon a "judgment."

Giving to F. R. C. P. 24(a)(3) the interpretation clear from its plain language, Formulabs had the right to intervene.

Point 2.

The Decision of the Court of Appeals for the Ninth Circuit:

(a) Is Not in Conflict With the Decision of Another Court of Appeals on the Same Matter;

(b) Is Not in Conflict With Applicable State or Territorial Law;

(c) Is Not in Conflict With Applicable Decisions of This Court;

(d) Has Not Departed From the Accepted and Usual Course of Judicial Proceedings, nor Sanctioned Such a Departure by a Lower Court, as to Call for the Exercise of This Court's Supervision.

The present case is believed to be one of first impression with regard to F. R. C. P. 24(a)(3). There are earlier decisions relating to the right to intervene prior to

the Federal Rules of Civil Procedure which support the Formulabs position and there are other decisions construing subsections other than 24(a)(3). The facts alleged in the heading, however, are true to the best of our knowledge and belief.

Contrary to the allegations of the petitioner, there are no prior decisions with which the decision of the Court of Appeals below conflicts.

In the petition at page 26 petitioner alleges that the decision of the Court of Appeals below was contrary to certain listed cases. It is worth while to discuss these cases briefly to illustrate how far from the present case they really are.

Pure Oil Co. v. Ross (C. A. 7, 1948), 170 F. 2d 651.

This was an action of interpleader brought to determine conflicting claims of defendants to a sum of money in possession of the plaintiff wherein the defendants counterclaimed and one Schiff filed a petition to intervene as a party defendant which petition was denied by the lower court and from which denial Schiff appealed.

It was found that Schiff was in fact interested in the subject matter involved in the case and his claim related to no other subject matter.

Here was no question of right to intervene to protect property not the subject matter of litigation. Clearly the court could not pass upon that question.

With respect to this case the Court of Appeals below stated:

> "The opinion contains no analysis of Rule 24(a)(3), and the facts are so different from the situation in

the instant case that we derive no help from that decision in solving the problem before us." (Pet. App. A, p. 8).

Kaufman v. Societe International (C. A. D. C., 1951), 188 F. 2d 1017.

In an action by the Societe against J. N. McGrath, Attorney General and successor to the Alien Property Custodian, one Kaufman and another undertook to intervene upon the grounds that they were stockholders of the corporation owning the property involved. Intervention was denied and the would-be intervenors appealed.

The subject matter in which the petitioners for intervention were interested and in which they claimed an interest was the *res* involved in the action. The Court found that as stockholders they had no interest in that subject matter. In fact, they had no interest in any subject matter being disposed of by the Court.

Clearly this case cannot be controlling.

Dowdy v. Hawfield (C. A. D. C., 1951), 189 F. 2d 637, certiorari denied 342 U. S. 830.

It had been determined in an earlier case that the petitioner for intervention had no interest in the estate in the probate of which he sought to intervene. It was not a question of whether the petitioner's property was being adversely affected by the judgment or by an interlocutory order. She simply had no property rights to be protected and it had been so determined previously. The Court said:

"The appellants' interest in the estate was determined to be nothing in the former contest of the issues which are also presented in this case."

Relative to this *Dowdy* case, the Court of Appeals below said:

> "The factual situation is entirely different from the instant case. The opinion contains no analysis of Rule 24(a)(3), and the court was in no manner required to pass upon the issue which is involved in this appeal." (Pet. App. A, pp. 7, 8).

Kelley v. Summers (C. A. 10, 1954), 210 F. 2d 665.

Here a compensation insurer sought to intervene against a third party tort-feasor, having made payment, and it was held that the insurer had a sufficient interest in the subject matter of the litigation to enable it to intervene.

Here was no third party seeking to intervene to protect property not the subject of litigation and adversely affected by the order of the court. The interest of the would-be intervenor was in the very subject of the litigation.

Peckham v. Ronrico Corp. (C. A. 1, 1954), 211 F. 2d 727.

In an action based upon alleged fraudulent concealment of assets of a judgment debtor a petition to intervene was filed. The Court of Appeals held that intervention should be granted as the petitioner would be adversely affected by the disposition of shares pursuant to this judgment. Obviously this case could be no authority for a set of facts such as are present in the instant case.

The contention of the petitioner that the Court of Appeals below decided adversely to previous holdings does not stand up under careful consideration.

On page 38 of the petition, the case of *Krippendorf v. Hyde* (1884), 110 U. S. 276, 28 L. Ed. 145, was cited by Petitioner as supporting the contention that the "applicant for intervention must have an interest in the subject matter of the main action."

Respondent also views this decision favorably, but that it could possibly be interpretative of F. R. C. P. 24(a)(3) as amended in 1948, is not to be taken seriously.

Krippendorf v. Hyde recognized the inherent right of the possessor of proprietary interests in property to be heard in protection of that property, and the fundamental rights as there set forth justify the interpretation of 24(a)(3) as contended for by respondent.

In that case an action was brought to recover an amount alleged to be due for goods and merchandise sold. A writ of attachment was issued. The appellant, claiming ownership of the goods, was added as a party to the action but his name was later stricken without prejudice. Judgment was subsequently rendered in favor of the plaintiff and the attached property was ordered sold. The appellant, not a party to the action, thereupon filed a bill naming all parties to the action as defendants including the Marshal. The grounds of the decree of the Circuit Court below was that the appellant had a plain and adequate remedy at law. This Court said in part:

> "The principle is that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court and thereby prevent injustice or an inequitable advantage under *mesne* or final process, is not an original suit but ancillary and dependent, supplementary merely to an original suit out of which it had arisen and is maintained

without reference to the citizenship or residence of the parties.

* * * * * * *

"No one, even in equity, is entitled to be made or to become a party to the suit unless he has an interest in its object (Calvert, Parties, 13); yet it is the common practice of the courts to permit strangers to the litigation, claiming an interest in its subject-matter, to intervene on their own behalf to assert their titles. 'When any person . . . . claims to be entitled to an estate or other property sequestered whether by mortgage or judgment, lease or otherwise, or has a title paramount to the sequestration, he should apply to the court to direct an inquiry whether the applicant has any and what interest in the property sequestered. This inquiry is called an examination *pro interesse suo*. . . .' The grounds of this procedure are the duty of the court to prevent its process from being abused to the injury of third persons, and to protect its officers and its own custody of property in their possession, so as to defend and preserve its jurisdiction, for no one is allowed to question or disturb that possession except by leave of the court.

* * * * * * *

". . . So that, unless he is allowed to intervene by his present bill to stay the distribution of the fund, which, by the demurrer, is admitted to be his own, the anomaly will be presented, in judicial proceedings, of an award, dividing property among claimants, from which the only person excluded is the one whose sole and paramount title is confessed; and he will be compelled to stand idly by to witness the dis-

sipation of his property into many unknown hands, by a court, to whose jurisdiction he has submitted himself from the beginning, and which now remits him to an action for damages against its own officer who has simply acted under its order."

The fundamental rights recognized in 1884 in that case can and should be applied today in the interpretation of F. R. C. P. 24(a)(3).

At page 48, paragraph 10, the petition for certiorari alleges that the Court of Appeals interpretation of F. R. C. P. 24(a)(3) enlarges or alters Federal jurisdiction and cites in support thereof the following:

2 Barron & Holtzoff, Section 593, p. 202;

Bantel v. McGrath, 215 F. 2d 297.

Such is not the case and in fact Federal jurisdiction was recognized long prior to the Federal Rules of Civil Procedure as is set forth in the discussion above of the *Krippendorf* case.

2 Barron & Holtzoff, Section 593, p. 202.

In this citation relied upon by petitioner we find the following:

"Rule 24 does not enlarge federal jurisdiction."

As indicated, there is no reason to contest this point. *Bantel v. McGrath* (C. A. 10, 1954), 215 F. 2d 297.

This case, relied upon by petitioner, was an action by the Attorney-General under the Trading with the Enemy Act to enforce a vesting order for the possession of property belonging to German Nationals who were beneficiaries in a trust. The District Court denied the right of the German Nationals to intervene and they appealed.

The Court of Appeals held the case was mooted, for the property had been turned over under the authority of Section 17 of the Act, and any further proceeding to determine rights would be under "Section 9(2) of the Act giving non-enemy owners a right to maintain a suit for recovery of seized property." Clearly this special set of facts and circumstances lend no aid to the interpretation of F. R. C. P. 24(a)(3) when applied to the present case.

The decisions relied upon by the petitioner do not support a conclusion contrary to the averments of the heading of this point.

As previously stated, no prior decision directly in point has been found by any party. However, it is felt that the interpretation for which respondent contends finds some precedent in spirit, at least, in the cases including the following:

Kozak v. Wells (C. A. 8, Apr. 26, 1960), 3 F. R. Serv. 2d 24a.2, Case 1, ... F. 2d .....;

Ford Motor Company v. Bisanz Bros. Inc. (C. A. 8, 1957), 249 F. 2d 22, 2 F. R. Serv. 24a.2;

Clark et al. v. Sandusky, et al. (C. A. 7, 1953), 205 F. 2d 915;

Mack et al. v. Passaic Nat'l Bank & Trust Co. (C. A. 3, 1945), 150 F. 2d 474;

Wolpe et al. v. Poretsky, et al. (C. A. D. C. 1944), 144 F. 2d 505.

Point 3.

The Decision of the Court of Appeals for Ninth Circuit Has Decided an Important Question of Federal Law but Its Decision Clearly Correctly Interprets Federal Rule(s) of Civil Procedure 24(a)(3).

Rule 19(1)(b) of this Court sets forth that a sound reason for the court's taking jurisdiction of the question, despite the absence of the various grounds set forth under the preceding point of this brief, comprises the presence of an important question "which should be settled by this Court."

It is recognized that the question involved is important, but it is also believed that the decision of the Court of Appeals is so clearly correct, and consistent with the plain language of the rule involved, that there is no sound reason that the time of this Court should be taken to reinforce that decision.

As interpreted by the Court of Appeals, F. R. C. P. 24(a)(3) provides the following rights and advantages:

First, a direct remedy is provided to the owner of a proprietary right being adversely disposed of by the processes of a court;

Second, it enables the lower court to give complete relief;

Third, multiplicity of actions and circuity are avoided;

Fourth, an adequate remedy is provided where no other exists, as in the present case in which a state court has no right to enjoin a federal court, as under the present set of facts; and

Fifth, it carries out the purpose of the Federal Rules to promote justice and to give adequate relief.

Point 4.

To Deny the Right to Intervene to Protect One's Property From Destruction by the Processes of the Court Is to Deny Due Process of Law.

Formulabs raised this issue of the violation of its Constitutional rights through denial of due process of law in the District Court [R. 211-228]. The issue was also raised before the Court of Appeals (Appellant's Br. pp. 18-21).

In the District Court before Formulabs filed its petition for intervention, it was the original position of petitioner Hartley that the unauthorized disclosure of the Formulabs trade secret would be taking property without due process of law.

> "Mr. Falcone: . . . and I think you would be taking Formulabs' property without due process." [R. 277].

> "Mr. Falcone: May I ask the court what, if anything, it (the court) proposes to do regarding Formulabs and our obligation to Formulabs? Do you think Formulabs should be brought in and given an opportunity to protect its rights?" (Parenthetical matter added.) [R. 298].

> "Mr. Falcone: What I am trying to say is that I want to advise Formulabs of the court's order. Now, they may want to bring in their attorneys and I suppose they would want to do something about it.
>
> ". . . Formulabs isn't here, they are not represented and I think seriously this is taking property without due process because they haven't had a

chance to do anything about it. I want to advise them of the court's order.

"The Court: The only thing I want to say, gentlemen, is that if it is not furnished, I will never try this lawsuit until it is furnished." [R. 309-310].

There can be no reasonable difference of opinion concerning the following:

1. A trade secret is entitled to the protection of the law.
2. Public disclosure of a trade secret destroys the secret and the property therein.
3. The secret of a trade secret is destroyed by disclosure under court order relating to discovery just as completely as by a disclosure under a judgment.
4. A trade secret in the possession of a party is under the control of the court, and the court exercises that control when it orders the secret disclosed.
5. To destroy property by order of court without giving to one having a proprietary interest therein the opportunity to be heard is to violate the due process law provision of the Constitution.

Amendment Fourteen of the United States Constitution at Section 1 provides in part as follows:

". . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

The Fifth Amendment contains the prohibition against the Federal Government as follows:

"No person shall be . . . deprived of life, liberty or property, without due process of law; . . ."

". . . the legal import of the phrase 'due process of law' is the same in both amendments."

French v. Barber Asphalt Paving Co. (1901), 181 U. S. 324, 329, 45 L. Ed. 879, 884.

The Constitution of the State of California in Article I, Section 13, provides in part:

"No person shall . . . be deprived of life, liberty, or property without due process of law."

Mr. Justice Field in *Hagar v. Reclamation District No.* 108 (1883), 111 U. S. 701, 28 L. Ed. 569, page 572, said:

". . . The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Formulabs should not be deprived of its property under the law without first being given the right to protect it.

"A hearing or an opportunity to be heard is an essential element of due process of law."

16A C. J. S., Constitutional Law, Sec. 622;

Ochoa v. Hernandez y Morales (Porto Rico), 33 S. Ct. 1033, 1038, 230 U. S. 139, 57 L. Ed. 1427.

Due process requires that before one can be deprived of property, notice and opportunity for hearing before some tribunal authorized to determine the question shall be had.

Hill v. Badeljy, 107 Cal. App. 598, 290 Pac. 637, 639;

Suckow v. Board of Medical Examiners, 182 Cal. 247, 187 Pac. 965, 966.

As was said in the dissenting opinion by Mr. Justice Carter in *Simpson v. City of Los Angeles,* 40 Cal. 2d 271, 253 P. 2d 464, 473,

> ". . . While it is impossible to define with precision 'due process of law' it means, broadly speaking, that before a man's property may be taken by the state, he must be given notice of the proceedings which may terminate in the taking, and be given an opportunity to be heard. . . ."

It would be presumptuous here to try to tell this Court what "due process of law" comprises. A careful search has failed to disclose an earlier case in which there has been an effort to prevent the disclosure of a trade secret by the assertion of the right to due process of law. Perhaps in view of the unusual character of this case that is not too surprising.

However, if we accept the statements numbered 1 to 5 above, it is clear that the order of the District Court denying intervention [R. 236] violated Formulabs' right to due process. It was admitted the trade secret was secret and that Formulabs had a proprietary interest therein. It is clear that no one has any right to that secret in the absence of the consent of Formulabs. Hartley received the secret as a confidential disclosure and its undertaking not to disclose was evidenced by its contract attached to intervenor's proposed cross-complaint [R. 78-81]. The order of the District Court to Hartley to disclose that secret was a violation of Formulabs' proprietary rights and a direction to Hartley to breach its obligation under the contract. For the court then to deny the right of Formulabs to be heard in protest of this invasion of its rights by refusing intervention [R. 236]

would, it is respectfully represented, constitute a simple and clear denial of due process and a violation of Formulabs' Constitutional rights.

Point 5.

The Petition Fails to Present Any Special or Important Reasons Justifying the Consideration of This Court.

It is the view of respondent that there is but a single principal question involved and as discussed above. No denial is made that it is important but it is denied that there exists any special or important reasons justifying consideration by this Court.

On its face, F. R. C. P. 24(a)(3) provides the relief which Formulabs sought in the District Court. The Court of Appeals for the Ninth Circuit stated respondent's position with clarity and in the following words:

> ". . . Under its (F.R.C.P. 24(a)(3)) plain language any person has the right to intervene if he is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court. In our view Formulabs is so situated. Admittedly it is the owner of the secret formula and secret testing procedures. They are being used by Hartley under a license agreement which forbids disclosure by Hartley. Admittedly Hartley has knowledge of the secret formula and the secret testing procedures. It is a party to the main action pending in the district court. It is subject to the jurisdiction of that court. Under said circumstances, the secret formula and the secret testing procedures are subject to the control or disposition of the court.

There can be no question that Formulabs will be adversely affected by an order of the court requiring publication of these trade secrets. As stated in *Cincinnati Bell Foundry Co. v. Dodds* (1887), 19 Weekly Law Bulletin, 10 Ohio Reprint 154:

> 'The property in a trade secret is the power to make use of it to the exclusion of the world. If the world knows the process then the property disappears. There can be no property in a process, and no right of protection if knowledge of it is common to the world.'

"The fact that Formulabs may have the right to seek damages or an injunction against Hartley in the state court is in our view a completely inadequate remedy.

"We hold that under the plain language of Rule 24(a)(3) Formulabs had a right to intervene in the main action, and the district court erred in denying its application."

The rule is clear on its face. It has been interpreted by the Court of Appeals in accordance with its clear meaning. No special or important reason is recognized for the intervention of this tribunal.

Conclusion.

The petition for writ of certiorari filed on behalf of Hartley Pen Company presents no meritorious reasons justifying its grant. The denial of the petition is respectfully urged.

Respectfully submitted,

WILLIAM DOUGLAS SELLERS,

Attorney for Respondent Formulabs, Inc.

Dated: June 3, 1960.